

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PRISON LEGAL NEWS,

Plaintiff,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. C 07-02058 CW

ORDER GRANTING IN
PART AND DENYING
IN PART
PLAINTIFF'S
MOTION FOR
RECOVERY OF
ATTORNEYS' FEES
AND COSTS

Plaintiff Prison Legal News has filed a motion for recovery of reasonable attorneys' fees. Defendants oppose the motion. The motion was decided on the papers. Having considered all of the papers filed by the parties, including Defendants' sur-reply and Plaintiff's opposition to the sur-reply, the Court grants Plaintiff's motion in part and denies it in part.

BACKGROUND

Plaintiff Prison Legal News (PLN) is an organization that alleged that the California Department of Corrections and Rehabilitation (CDCR) illegally censored its publications. In January, 2006, the parties entered into an agreement to negotiate

1 in order to settle Plaintiff's claims and to avoid litigation. In
2 December, 2006, the parties entered into a settlement agreement.
3 The settlement agreement provided for payment to PLN as the
4 prevailing party through December 11, 2006, the date the settlement
5 agreement was executed. However, Defendants opposed PLN's request
6 for attorneys' fees and costs for work performed after the
7 agreement was executed. On October 9, 2007, PLN moved to recover
8 fees and costs incurred between December 12, 2006 and August 31,
9 2007 and to establish a semi-annual fee process.

10 The Court granted the motion in part and concluded that,
11 because PLN is the prevailing party in this action, it is "entitled
12 to attorneys' fees for work performed after the settlement
13 agreement was signed." Docket no. 35 at 5. The Court denied PLN's
14 request to establish a semi-annual fee process but noted that PLN
15 could file further motions for attorneys' fees. PLN now moves the
16 Court to order Defendants to pay \$143,322.96 in attorneys' fees,
17 costs and expenses for work performed from September 1, 2007
18 through October 15, 2008.

19 DISCUSSION

20 I. Reasonableness of Fees

21 In the Ninth Circuit, reasonable attorneys' fees are
22 determined by first calculating the "lodestar." Jordan v.
23 Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). "The
24 'lodestar' is calculated by multiplying the number of hours the
25 prevailing party reasonably expended on the litigation by a
26 reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d
27 359, 363 (9th Cir. 1996). There is a strong presumption that the

1 lodestar figure represents a reasonable fee. Jordan, 815 F.2d at
2 1262. However, the court may adjust the award from the lodestar
3 figure upon consideration of additional factors that may bear upon
4 reasonableness. Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70
5 (9th Cir. 1975). The twelve Kerr factors are (1) the time and
6 labor required, (2) the novelty and difficulty of the questions
7 involved, (3) the skill requisite to perform the legal service
8 properly, (4) the preclusion of other employment by the attorney
9 due to acceptance of the case, (5) the customary fee, (6) whether
10 the fee is fixed or contingent, (7) time limitations imposed by the
11 client or the circumstances, (8) the amount involved and the
12 results obtained, (9) the experience, reputation, and ability of
13 the attorneys, (10) the "undesirability" of the case, (11) the
14 nature and length of the professional relationship with the client,
15 and (12) awards in similar cases. Id.

16 The Supreme Court has recognized that, while it is appropriate
17 for the district court to exercise its discretion in determining an
18 award of attorneys' fees, it remains important for the court to
19 provide "a concise but clear explanation of its reasons for the fee
20 award." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hall v.
21 Bolger, 768 F.2d 1148, 1151 (9th Cir. 1985) (in computing an award,
22 the district court should provide a "detailed account of how it
23 arrives at appropriate figures for 'the number of hours reasonably
24 expended' and 'a reasonable hourly rate'" (quoting Blum, 465 U.S.
25 at 898).

26 A. Work Performed

27 Plaintiff requests a total of \$143,322.96 in fees and costs
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1 for work on the case between September 1, 2007 and October 15,
2 2008. This amount represents \$54,382.67 for work to ensure and
3 enforce compliance with the settlement agreement, and \$88,940.29
4 for fees work. Defendants argue that 55.25 of the 162.7 hours
5 billed by Plaintiff's counsel are unreasonable because they are for
6 work not relevant to the settlement agreement or not benefitting
7 Plaintiff. Defendants separated these 55.25 hours into three sub-
8 categories, (1) 4.8 hours of work related to inmate issues, (2)
9 26.7 hours of work related to corresponding with inmates, and (3)
10 23.75 hours for work related to general censorship issues.

11 First, Defendants categorize 4.8 hours of Plaintiff's
12 counsel's work as related to inmate issues not relevant to the
13 instant case. The Court reviewed these charges and concludes that
14 they reasonably relate to the settlement agreement. Second,
15 Defendants charge that any direct communication with inmates by
16 Plaintiff's counsel in the course of enforcing the settlement
17 agreement is unreasonable because all communication can come from
18 PLN. The Court disagrees. Nothing in the settlement agreement
19 requires Plaintiff's attorneys to communicate on settlement
20 enforcement issues only with PLN. Moreover, the settlement
21 revolves around PLN's right to deliver its publication to prisoners
22 in Defendants' custody. Thus, the prisoners themselves are often
23 in the best position to observe whether the settlement agreement is
24 being enforced. Defendants also question the reasonableness of
25 time spent corresponding with inmates in inform them about the
26 settlement agreement. Defendants note that because the Court, in a
27 previous order, allowed Plaintiff's counsel to bill for time spent
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1 preparing press releases about the settlement, it is duplicative
2 and unreasonable to discuss the settlement agreement with prisoners
3 individually. The Court disagrees. To enforce the settlement
4 agreement, prisoners must understand their rights and privileges
5 under the agreement. Addressing prisoners' questions and concerns
6 is integral to this process.

7 Third, Defendants argue that 23.75 hours of work billed
8 relates to censorship issues outside the scope of the settlement
9 agreement. Paragraph 1(i) of the settlement agreement states,

10 The parties agree that the CDCR will develop a
11 centralized list of disapproved magazines or
12 publications that are prohibited as offensive,
13 threatening, contain security concerns, or obscene as
14 described in the DOM, or any other regulation. The CDCR
15 will provide a copy of that list to PLN's attorneys
16 within 30 days after it is issued. The parties agree
17 that the centralized list is not the only method to
18 prohibit publications, and that nothing prohibits
19 institutions from disallowing material as described in
20 the DOM, or any other regulation, provided it meets
21 constitutional requirements.

22 Defendants argue that Plaintiff's counsel can charge for work
23 related to the creation of the "centralized list" described above,
24 but not for issues relating to CDCR's prohibition of other
25 materials from institutions. Plaintiff's counsel counter that
26 addressing other censorship issues directly relates to enforcing
27 the section of the settlement agreement that notes that
28 institutions may still disallow "material as described in the DOM,
or any other regulation, provided it meets constitutional
requirements." (Emphasis added). What Defendants describe as
"censorship issues," Plaintiff's counsel argue is really work done
to ensure that all exclusion of material satisfies the requirements

1 of the constitution.

2 Although the settlement agreement revolves around PLN's
3 allegations that the CDCR censored PLN publications, the agreement
4 does not provide a mandate for PLN to police the constitutionality
5 of all prison-censored material. Rather, the agreement noted that
6 "[t]he parties agree" that all other means of disallowing material
7 are still available to prisons, "provided [they] meet[]
8 constitutional requirements." The parties simply agreed that CDCR
9 would follow prison rules and the constitution. They did not agree
10 that PLN would serve as the enforcement arm of all censorship
11 issues for all prisoners indefinitely. Therefore, Plaintiff's
12 counsel's fees for 23.75 hours of work performed in relation to
13 prison material that was censored under the DOM or other
14 regulations will not be reimbursed.

15 B. Hourly Rate

16 Determining a reasonable hourly rate is a critical inquiry.
17 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895
18 n.11 (1984)). In establishing the reasonable hourly rate, the
19 court may take into account: (1) the novelty and complexity of the
20 issues; (2) the special skill and experience of counsel; (3) the
21 quality of representation; and (4) the results obtained. See
22 Cabrales v. County of Los Angeles, 864 F.2d 1454, 1464 (9th Cir.
23 1988). These factors are subsumed in the initial lodestar
24 calculation, and should not serve as independent bases for
25 adjusting fee awards. Morales, 96 F.3d at 363-64. The reasonable
26 rate inquiry should also be informed by reference to the prevailing
27 market rates in the forum district. Gates v. Deukmejian, 987 F.2d

1 1392, 1405 (9th Cir. 1992).

2 Plaintiff seeks an hourly rate of \$740 for Sanford Jay Rosen,
3 a 1962 law school graduate and the lead attorney on its case, \$370
4 for Amy Whelan, a 2001 law school graduate, \$340 for Kenneth
5 Walczak, a 2003 law school graduate, and \$170 for Melanie
6 Wilkinson, a paralegal. These rates represent Plaintiff counsel's
7 2008 rates. Defendants argue that Plaintiff's counsel should not
8 receive 2008 rates for work performed in 2007.

9 "District courts have the discretion to compensate prevailing
10 parties for any delay in the receipt of fees by awarding fees at
11 current rather than historic rates in order to adjust for inflation
12 and loss of the use funds." Gates, 987 F.2d at 1406. In Missouri
13 v. Jenkins, the Supreme Court allowed current billing rates to
14 apply to legal work performed several years before the fees were
15 awarded. 491 U.S. 274, 284 (1989). The Court noted that
16 "clearly, compensation received several years after the services
17 were rendered -- as it frequently is in complex civil rights
18 litigation -- is not equivalent to the same dollar amount received
19 reasonably promptly as the legal services are performed, as would
20 normally be the case with private billings." Id. The Court then
21 held that "an appropriate adjustment for delay in payment --
22 whether by the application of current rather than historic rates or
23 otherwise -- is within the contemplation of the statute." Id.

24 In the present case, Plaintiff's counsel is not seeking
25 compensation for work performed years earlier. Rather, Plaintiff's
26 counsel seek fees for work going back to September 1, 2007.
27 Although this delay is not as long as in Jenkins, the Court

1 recognizes that "a fee award at current rates is intended to
2 compensate prevailing attorneys for lost income they might have
3 received through missed investment opportunities as well as lost
4 interest." Gates, 987 F.2d at 1406. Therefore, Plaintiff's
5 counsel shall be paid at 2008 rates for the work performed in 2007.

6 Defendants also argue that the 2008 rates are unreasonable and
7 that the Court should adopt the Laffey Matrix to determine rates.
8 The United States Department of Justice uses the Laffey Matrix to
9 determine reasonable hourly rates in the District of Columbia in
10 fee-shifting cases. The Court declines to adopt the matrix in this
11 case. As noted above, local prevailing market rates inform the
12 reasonable rate inquiry, Gates, 987 F.2d at 1405, and Plaintiff's
13 counsel provide ample evidence that its 2008 rates are reasonable
14 by citing to eight local law firms that charge similar 2008 rates.
15 See Rosen Dec. ¶ 56. Therefore, the Court will not reduce the
16 hourly rates claimed by Plaintiff's counsel.

17 II. Settlement Obligations

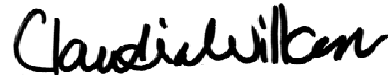
18 Despite substantial progress made by Defendants in fulfilling
19 the settlement agreement, the Court declines Defendants' request to
20 conclude that CDCR has completed all of its obligations under the
21 settlement agreement and that no more fees applications may be
22 submitted by Plaintiff. Defendants are mistaken that all of their
23 obligations are complete simply because they distributed a
24 centralized list of banned publications to all adult institutions
25 and distributed an internal memorandum about updated inmate mail
26 regulations. See Brinkman Dec. ¶ 14, Ex. H. Defendants
27 obligations do not end with merely completing these two tasks. In
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the settlement agreement, Defendants have agreed to stop many practices, such as requiring the PLN to use special, approved vendor labels when distributing publications to CDCR inmates; and Defendants have also agreed to engage in other practices, such as notifying inmates and publishers when they disallow a publication. See Brinkman Dec. Exh. A ¶¶ 1(b) and (h). Defendants shall continue to follow the terms of the settlement and Plaintiff's counsel may incur reasonable fees ensuring that they do so.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for attorneys' fees is GRANTED in part and DENIED in part (Docket No. 39). The Court awards Plaintiff \$137,502.46 in fees and expenses,¹ to be paid forthwith by Defendants.

IT IS SO ORDERED.



Dated: 12/5/08

CLAUDIA WILKEN
United States District Judge

¹\$137,502.46 = Total fees requested (\$143,322.96) minus fees for work that related to censorship issues outside the scope of the settlement agreement (\$5,820.50). The \$5,820.50 figure was calculated as follows: (Sanford Jay Rosen (0.9 hours x \$740 per hour = \$666)) + (Amy E. Whelan (4.65 hours x \$370 per hour = \$1720.50)) + (Kenneth M. Walczak (2 hours x \$340 per hour = \$680)) + (Melanie E. Wilkinson (16.2 hours x \$170 per hour = \$2754)) = \$5,820.50.